BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of:

HARGROVE ELECTRIC CO., INC., Respondent,	**Case No. 16-CA-27812**
ALMAN CONSTRUCTION SERVICES, LP, Respondent,	**Case No. 16-CA-27813**
BOGGS ELECTRIC CO., INC., Respondent	**Case No. 16-CA-27814**
and	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 20, Charging Party.	

CHARGING PARTY IBEW LOCAL 20'S REPLY TO RESPONDENTS' ANSWERING BRIEF

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Pursuant to Sec. 102.46(h) of the Board's Rules, Charging Party International Brotherhood of Electrical Workers Local 20 ("Charging Party Local 20") submits the following in reply to the Answering Brief filed by Respondents Hargrove, Alman, and Boggs ("Respondents") in the above identified cases. In this respect, Charging Party Local 20 relies on its previously filed Brief In Support Of Exceptions, and limits its reply to three (3) aspects of the Answering Brief: (1) Respondents' continuing argument that subject dues deduction authorizations were not voluntary; (2) Respondents' argument that *Bethlehem Steel*, 136 NLRB 1500 (1962) and cases which follow it should not be overruled retroactively; and (3) Respondents' argument that, if they are required to reimburse the Union for dues deductions which they wrongfully failed to

deduct and pay, they should be entitled to obtain reimbursement of those amounts from affected employees' prospective wages.

1. Respondents' Claim that Subject Dues Deduction Authorizations were and are not voluntary.

Respondents continue to argue that their unilateral cessation of dues authorization deduction and payment, without bargaining in good faith to impasse, was not an unfair labor practice because dues deductions authorizations they unilaterally ceased honoring were "not voluntary." *See* Answering Brief at pp. 12-13. Respondents' "evidence" to this effect is isolated forms which provide for vacation deduction as well as authorizing deduction of dues. Record evidence shows that Respondents had honored the subject forms for years, and that neither affected employees nor Respondents had ever before contended that the forms' authorization of dues deduction was "not voluntary." (*See* R. 79-80). When Respondents Boggs and Alman resumed dues deduction in calendar year 2011 following the filing of subject unfair labor practice charges, they did not then contend or suggest that the forms were "not voluntary." (R. 81). There is no independent evidence in the record that any affected employee has otherwise contended or complained that his or her authorization for dues deduction was not voluntary. (*See especially* R. 79-81). Finally, nothing in the case law cited by Respondents in support of the general proposition that dues deduction authorizations must be voluntary (*see* Answering Brief at pp. 11-12) speaks to the forms or other evidence applicable here. In short, Respondents' claim that subject dues deduction authorizations were or are "not voluntary" is manufactured hyperbole, without support in record facts or law.

There is no valid general issue as to the voluntary nature of the subject authorizations. Issues as to individual authorizations, if there are any, should be resolved at the compliance stage. *Stackpole Components Company*, 232 NLRB 723 (1977).

2. Respondents' Argument That A Determination By The Board To Overrule *Bethlehem Steel* Should Not Be Applied Retroactively.

Respondents argue that *Bethlehem Steel* should not be overruled retroactively, so as to require them to reimburse Charging Party Local 20 for dues deduction Respondents failed to make and pay, because: (1) Respondents were entitled to rely on *Bethlehem Steel's* authority and were "entitled to prior warning of a change" which they did not receive; and (2) retroactive application of a new rule of law overruling *Bethlehem Steel* would work a "manifest injustice" as to Respondents. (*See* Answering Brief at pp. 13-14).

In *SNE Enterprises, Inc.*, 344 NLRB 673 (2005), a case upon which Respondents otherwise rely, the Board wrote:

> . . . the Board majority's retroactive application of the Harborside standard is consistent with longstanding Board practice. The Board's usual practice is to apply new policies and standards retroactively "to all pending cases in whatever stage." *See Aramark School Services*, 337 NLRB 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)). *Id*. at 673.

Simply put, retroactive application of a new rule of law is the ordinary, common course.

Moreover, Respondents were not "without prior warning" when, in December of 2010, they implemented their long-standing threat unilaterally to reduce selected terms and conditions of employment without first bargaining to Impasse and, as an adjunct to that calculated course of unlawful conduct, unilaterally ceased dues deductions and related dues deductions payment. By that time, the intent of Chairmen Liebman and member Pierce to challenge the continuing vitality of *Bethlehem Steel, supra*, had been articulated and published in *Hacienda Resort Hotel & Casino,* 355 NLRB No. 154 (2010). Respondents and their counsel were, or at least should have been, on notice that *Bethlehem Steel* was likely to be overruled in the immediate future. Respondents and their counsel could not reasonably have been surprised by the Ninth Circuit's subsequent decision in *Local Joint Executive Board v. NLRB*, 657 F.3d 865 (9th Cir. 2011),

specifically holding that *Bethlehem Steel* should not continue as controlling authority in a case such as that presented here. Respondents were not "without prior warning" that a new rule of law was coming.

Finally, there is no "manifest injustice" here. Respondents' unilateral cessation of dues deduction and dues deduction payment was no "honest mistake." Rather, it was probatively part of a calculated course of unlawful conduct devised and implemented for the purpose of pressuring Charging Party Local 20 into agreement to a substandard contract, burdening bargaining unit employees with temporary loss of existing terms and conditions of employment in violation of applicable Board law, and punishing those employees' bargaining representative with loss of the dues money Respondents had promised to deduct and pay. It is peculiarly ironic that when Respondents attempt to articulate the "manifest injustice" which would result from retroactive application of the new rule represented by overruling *Bethlehem Steel,* they point to no hardship they (Respondents) would suffer but instead state that the new rule "would only financially aid the Union to the detriment of those employees who had not paid their union dues during the contract interregnum and from whose pay the retroactive dues would be deducted." (Answering Brief at p. 14). Of course, Local 20 does not seek and would not require deduction of the dues money owed by Respondents from the wages of affected employees. (See discussion below.) Respondents have articulate no "manifest injustice" they will suffer by retroactive application of the Board's overruling of *Bethlehem Steel* and applying the new rule of law which results retroactively.

Respondents' arguments against retroactive application of the overruling of *Bethlehem Steel*, a result which Local 20 seeks in its Exceptions previously filed, are singularly and in their sum without merit.

3. Respondents' Should Not Be Entitled To Reimbursement From Affected Employees' As To The Dues Deduction Payments Which Should Be Required As Part Of The Remedy In This Case.

As remedy for Respondents' unlawful conduct in unilateral ceasing dues deduction and payment pursuant to lawful authorizations, Charging Party Local 20 has requested that Respondents be required to reimburse Local 20 for all dues deduction payments they have unlawfully refused to make **without obtaining reimbursement** from affected employee's current or future wage earnings.

In our Brief in Support of Exceptions previously filed herein, we noted at footnote 11 that we are unaware of any meaningful discussion or analysis concerning such a requested remedy in existing Board case law. We noted there that in *Sommerville Construction Co.*, 327 NLRB 514 at fn. 2 (1999) the Board articulated an analogous remedy as being "to reimburse the union for dues deduction payments that it has unlawfully refused to make." (*See also W.J. Holloway & Son*, 307 NLRB 487, fn.3 (1992)). In neither case does the Board's articulated remedy make reference to a right on the part of the subject employer to obtain reimbursement for such payments from affected employees' current or future wage earnings. Two more recent decisions, *Wheeling Brake Block Mfg. Co.*, 352 NLRB 489, 490 (2008) and *Mountain Valley Care & Rehabilitation Center*, 346 NLRB 281, 283 (2006) make provision for reimbursement of dues not deducted or paid without reference to the offending employer's right to reimbursement from the affected employees. *Mountain Valley* characterized the remedy in "make whole" terms:

> (b) Make the International whole for any loss of dues suffered as a result of the failure to comply with the dues provision of the collective-bargaining agreement, plus interest, as provided in the remedy section of the judge's decision.

We continue to believe that as a general proposition, Board law has contemplated that the appropriate remedy for an employer's wrongful failure to deduct and pay dues is that the Union

is to be “made whole” -- reimbursed for the resulting monetary loss -- **without** permitting the offending employer to reimburse itself from affected employees’ wages.

In their Answering Brief, Respondents cite two (2) isolated case decisions in which the Board articulated a remedy which specifically provided for the employer’s obtaining reimbursement for such payments by deducting dues from employees’ future wages (*Bebley Enterprises*, 356 NLRB No. 64 (2010)) or provided for offset of dues deduction payments from a backpay payment to affected employees ordered as part of a larger unfair labor practice remedy. (*Ogle Protection Services, Inc.*, 183 NLRB 682 (1970)). These cases are not dispositive of our claim for the remedy articulated above. Neither case discusses or analyzes the underlying policy issues: unfair hardship upon employees and the labor union which represents them, necessarily resulting when an employer is permitted to obtain reimbursement from employees’ current or future wages.

This remedy issue must be viewed in the larger context. When bargaining for a successor collective bargaining agreement began in late 2010, Respondents unilaterally imposed broad based reductions in employees’ terms and conditions of employment without first bargaining to good faith impasse. Respondents’ unilateral cessation of dues deduction and related payment was an adjunct of this conduct, collectively calculated to coerce, threaten and restrain bargaining unit employees in the exercise of their Section 7 rights and to weaken their collective bargaining representative as negotiations progressed. While affected employees may have temporarily “enjoyed” a net earnings increase when dues deduction ceased, they were simultaneously faced with the threat of a long term reduction in their terms and conditions of employment. They were not highly paid employees, and it was predictable that they would not independently make dues payments when they were threatened with loss of future terms and conditions of employment. The predictable effect, clearly intended by Respondents’ unlawful

conduct, was that Local 20 as their bargaining representative was financially weakened by the loss of dues payments at the very time affected employees most needed a strong representative. And of course, Local 20 would scarcely be in a position to harass employees for independent payment of dues monies -- those employees were being threatened with a substandard contract and long term loss of earnings, terms, and conditions. It is crystal clear that Respondents' unlawful cessation of dues deduction and payment was an integral part of their (Respondents') attack on bargaining unit employees and their collective bargaining representative.

Now, Respondents suggest that this unlawful conduct -- the unilateral cessation of dues deduction and payment -- should effectively go unpunished. They argue that affected employees must bankroll Respondents' reimbursement of dues deduction monies, and that if employees complain about the resulting reduction in their future net wages, Respondents need only explain that "the Union is responsible -- it is the Union that is making us double up on the deduction from your wages."

In simple summary, Respondents want to parlay their unfair labor practice conduct (unilateral cessation of dues deduction and payment beginning in December of 2010) into the unseemly result that bargaining unit employees and the Union are punished for that conduct. This cannot be what the Act intends, and such a result cannot be squared with the Act's central purpose in preserving employees' Section 7 rights. To the extent that they provide otherwise, *Bebley Enterprises* and *Ogle Protection Services* are wrong, and should not control the remedy in this case.

As we have said in prior briefs, federal courts have repeatedly recognized that the burden of failure to make required dues deduction and payment must fall **on the employer -- and not on the employees or Union.** Supreme Court Justice Tom Clark, writing *per curium* for

the panel in *Valmac Industries, Inc. v. Meat Cutters Local 425*, 528 F.2d 217 (8th Cir. 1975), wrote that "any reduction (permitting the employer to resort to employees' wages as an offset) would encourage the very conduct the Act sought to discourage – "bad faith" bargaining." 528 F.2d at 219. *See*, to the same effect, *Humility of Mary Health's Partners v. Teamsters Local 377*, 896 F. Supp. 2d 840 at 850 (N. D. Ohio 2003) citing *Washington Post v. Washington-Baltimore Newspaper Guild*, 787 F.2d 604, 607 (DC Cir. 1986); *See also, United Steelworkers of America v. United States Gypsum Co.*, 492 F.2d 713, 734 (5th Cir. 1974).[1]

The only appropriate remedy addressing Respondents' wrongful unilateral cessation of dues deduction and payment beginning in December of 2010 is to require **Respondents -- and Respondents alone** -- to bear the monetary burden of their unfair labor practice conduct. Respondents must be required to reimburse Charging Party Local 20 for dues deduction payments wrongfully withheld, with interest, **without** deducting such amounts from employees' current or future wage earnings.

CONCLUSION AND PRAYER

Bethlehem Steel must be overruled, and replaced with the rule of law articulated by the Ninth Circuit in *Local Joint Executive Board v. NLRB, 657* F. 3d 865 (9th Cir. 2011). Respondents' unilateral cessation of dues deduction and payments must be found in violation of Sections 8(a)(5) and (1) of the Act. As remedy, Respondents must be required to reimburse Charging Party Local 20 for all dues deduction amounts wrongfully not paid, **without reimbursement** from affected employees' wage earnings.

DATED this 7th day of March, 2012.

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[1] / The argument presented in fn. 11 of Respondents' Answering Brief -- that requiring Respondents to make dues deduction payments out of their own pockets "runs counter to Section 302" -- is ridiculous. There are dues deduction authorizations supporting such payments, and the cited federal court case decisions logically and legally defeat the argument that Section 302 prohibits the remedy we seek. Respondents cite no case law -- or other authority -- which could require or justify a different result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2012, the foregoing Charging Party IBEW Local 20's Brief in Support of Exceptions was filed electronically to the following:

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